




MEMORANDUM

DATE: July 25, 2003

TO: Mayor and Council Economic
Development Subcommittee

FROM:


James Keene
City Manager

SUBJECT: Construction Procurement Practices

In response to the Economic Development Subcommittee's July 2 discussion of construction procurement practices utilized by City of Tucson and other municipalities, counties and universities, the Department of Procurement has prepared the attached information. Should you require additional information or clarification, please contact Assistant City Manager Karen Thoreson at 791-4204 or Wayne A. Casper, Director of Procurement at 791-4347.

JK:WAC:lec

Attachments

c: Karen Thoreson, Assistant City Manager
Wayne A. Casper, Director of Procurement

CONSTRUCTION CONTRACTING POLICIES

1. Use of the Invitation for Bids Source Selection Method

- Arizona Revised Statutes 34-21 states "The agent shall enter into a contract with the lowest responsible..." Exceptions permitted are through the use of an alternative method of project delivery, such as Design-Build, Job Order Contract or Construction Manager at Risk.
- The City is increasingly employing these alternative methods for construction contracting, which provides for qualifications based selection.

2. Bid Listing of Subcontractors

- Construction contracts for federally funded projects require a list of subcontractors in order to check for debarment. In addition, the City of Tucson requires bid lists for alternative project delivery methods, such as Design-Build, Job Order Contract or Construction Manager at Risk.
- The University of Arizona requires the contractor to include a subcontractor list with construction bids. UA's Bob Smith notes the advantages include allowing the owner to provide input on qualifications of subcontractors. A disadvantage noted is that this can "create chaos".
- A recent survey by the League of Arizona Cities and Towns indicates various practices and policies regarding the submission of subcontractor lists.
- When the list of subcontractors is required, the threshold amount of the contract value and the percent of subcontractor involvement triggering the requirement varies by city. Also varying is the timing of the submittal of the bid list. Attachment 1 is the result of the survey.

3. Health Insurance Requirement for Contractors

- The City of Tempe passed an ordinance in 2000 which requires consultants and contractors for public works to provide health insurance coverage for employees and their dependants who work for the contractor at least 120 days of the year. Donna Littrell, Tempe's Procurement Administrator, was not aware of any other municipality or public entity that had enacted similar requirements. Attachment 2 is the City of Tempe's policy.

4. Local Preference for Contractors

- The local business preference issue was scheduled for Mayor and Council Study Session on May 21, 2001. Attachment 3 is a copy of the draft Mayor and Council memorandum prepared by staff for the study session. This item was subsequently pulled from the agenda.

5. Training/Apprenticeship Programs

- HUD's "Section 3" regulations require contractors to provide employment, training and contracting opportunities for low income persons, to the greatest extent feasible. This requirement is included in all construction contracts for HUD funded projects. Attachment 4 is the "Section 3" contract provision.

ATTACHMENT 1**League of Arizona Cities and
Towns Survey**

Survey of cities in Arizona to determine if any have enacted an ordinance requiring bid listing. Bid listing requires the prime contractor bidding on a public job to list the subcontractors that will be used if the City accepts its bid.

Apache Junction

Avondale The City of Avondale does not have such an ordinance.

Benson

Bisbee

Buckeye

Bullhead City

Camp Verde

Carefree

Casa Grande

Cave Creek

Chandler

We do not have an ordinance, however, the City's standard form Invitation for Bids requires that the contractor include in his bid the major subcontractors and any bid not supplying this information can be rejected. Further the City retains the right to review the proposed subcontractors and require the contractor to substitute a new subcontractor without any increase in cost if the city or project designer objects to the proposed subcontractor. If the Contractor can't or won't substitute the contract is not awarded to that contractor.

Chino Valley

Clarkdale

Clifton No requirements for "Bid Listing" in Clifton or Duncan.

Colorado City

Coolidge

Cottonwood Our typical bid package does require that subcontractors be listed.

Douglas

Duncan No requirements for "Bid Listing" in Clifton or Duncan.

Eagar

El Mirage

Eloy

Flagstaff

Florence

Fountain Hills Not required by ordinance.

Fredonia

Gila Bend

Gilbert

There is not a Town ordinance but we require the listing in our standard bid forms for the Town.

Glendale

Globe

Goodyear

Grant Anderson: I've never seen this as an ordinance. However, in the bidding documents, it can be required and often is. If they don't list then it is a nonresponsive bid and not considered.

Cato Esquivel: Not by Code or Ordinance, but MAG specs states "When required, the List of Subcontractors form will be attached to the proposal pamphlet." We included the subcontractor listing form we designed for our contracts, which also asks for information on MBE qualifications, in case we ever have to provide statistics on that, even though we don't have MBE targets or requirements in our contracts. So, I would say, required by contract but not by Code.

David Ramirez: I agree with Cato's assessment. Reference Section 102.6 of the MAG Uniform Standard Specifications:

102.6 SUBCONTRACTORS' LIST:

When required, the List of Subcontractors' form will be attached to the proposal pamphlet. The bidder shall submit this form with his proposal, in a separate sealed envelope, listing the firm name and business address of each specialty subcontractor to whom he proposes to subcontract any portion of the work. Only one name shall be listed for each category. The bidder may list himself to perform one or more of the listed categories of work for which he has any requisite State licenses when required.

Guadalupe

Hayden

Holbrook

Huachuca City

Jerome

Kearny

Kingman

Lake Havasu City

We don't have such a requirement but it ain't a bad idea!!

We do not have an ordinance or at least we are not aware of one requiring the bid list but our bid documents require that the bidder supply all subcontractors that are proposed to be used on the job. We state the bid will be evaluated solely on the information provided in the bid i.e. the subs proposed. We also have language that allows us to reject the use of sub-contractors which were not listed in the bid. The notice to use additional or different subs must be submitted with the signed contract per our bid specifications.

Litchfield Park

Mammoth

Marana

Mesa

In response to your email regarding bid listing, the City of Mesa does not have an ordinance requiring contractors to list subcontractors at the time of bidding.

Miami

Nogales

Oro Valley

Page

Paradise Valley

Parker

Patagonia

Payson

The Town of Payson does not have an ordinance requiring prime contractors bidding on Town jobs to list subcontractors who will work on the job. However, it is the Town's standard policy to include in our bid specs a requirement that bidders provide with their bid a list of all subcontractors who will perform 10% or more of the work. Hope this is of some assistance.

Peoria

We do not maintain a bidders list for solicitations. We found that bidders lists requires significant personnel to maintain a system that is never completely accurate. There are also concerns with the assignment of commodity codes to match what is offered by the vendor. we utilize our time and money into targeting advertising in the industry publications and web page development. Our responses have increased by this change in business practice. In the construction arena, we require a subcontractor list by 9:00am the day after the bids were due. We do this for two reasons, we want to know who the vendors are and the subs who helped win the bid should participate in the contract (limits sub shopping).

Phoenix

Francisco M. Badilla: We do not have an ordinance that requires all bidders to submit a list of subcontractors at the time of bid, council approved a policy that we have been following for approximately one year and it has been working. Attached is the information and form being used at the present time. (2 attachments)

Mario Saldamando: I am responding to your request for information about requirements for "bid listing". The City of Phoenix does require listing of subcontractors at the time of bid on City projects. The clause "at the time of bid", although not mentioned in your email, is significant for your survey. Whereas it is very common to require listing of subcontractors before the work starts, it is not common to require listing at the time of bid like we do. It was not instituted by ordinance but is a bidding requirement. If you need details about the procedures please contact Cindy White, Engineering Supervisor, Engineering and Architectural Services, (602) 534-3315, cindy.white@phoenix.gov

Pima

Pinetop-Lakeside

Prescott

Prescott Valley

Quartzsite

Queen Creek

Safford

Sahuarita

San Luis

Scottsdale

I am unaware of any bid listing Ordinance, we searched the city Charter to try to confirm this. Generally the city's construction bid documents do not require the prime contractor to include a list of subcontractors such a list could be requested at a Pre-construction conference prior to initiating the work.

Sedona

Show Low

Sierra Vista

Snowflake

Somerton

South Tucson

Springerville

St. Johns

Superior
Surprise

The City of Surprise does not have an ordinance requiring prime contractors to list the subcontractors if awarded a contract. Our Invitation for Bid form requires that the bidder list the subcontractors with their bid, however this is not a requirement of an ordinance or our Procurement Code. I hope this information help, please feel free to contact me at 623-875-4355 if you have any other questions.

Taylor
Tempe

Amber Wakeman: The City doesn't have an ordinance but we do follow the provisions of Section 108.2 of the "Maricopa Association of Governments Uniform Standard Specifications for Public Works Construction" which lists the subcontractors. I have a sample of this document - if I need to fax it please let me know.

Andy Goh: City of Tempe follows the Section 108.2 of the "Maricopa Association of Government Uniform Standard Specifications for Public Works Construction" commonly known as MAG Specs, which require the prime contractor bidding on our CIP projects to list the subcontractors.

Thatcher
Tolleson
Tombstone
Tucson
Wellton
Wickenburg
Willcox
Williams

We do not currently have such an ordinance.

Winkelman
Winslow

The City of Winslow does not require bid listing.

Youngtown
Yuma

In response to your request, the City of Yuma does require the prime contractor bidding on a public job to list the subcontractors that will be used if the City accepts its bid. Although, this requirement was not done through any Ordinance or Resolution by our City Council.

No proposal will be read unless accompanied by a properly completed and signed "List of Subcontractors" form.

To assist in eliminating the practice of bid shopping on City construction projects, the bidder shall list all Subcontractors, including MBE, WBE, SBE, DBE, and specialty suppliers, to who the bidder intends to contract with and for an amount greater than or equal to 5% of the Base bid. The list of Subcontractors shall be provided on the "List of Subcontractors" form. Failure to properly complete and sign this form will result in bid rejection. This form is due with the bid.

ATTACHMENT 2
City of Tempe – Ensure to Insure Policy

City of Tempe

Guidelines for Implementation of Health Insurance

These Guidelines are provided for purposes of implementing Resolution No. 2000.73, which requires that health insurance be provided by all consultants, general contractors and major subcontractors, as determined at the start of each project, for employees and dependents of employees, and amends all previous Guidelines issued.

1. All consultants and general contractors, who bid on projects or enter into public works contracts in excess of \$30,000 with the City of Tempe, after January 1, 2001, are required to sign an affidavit in the form attached hereto. The general contractor shall be responsible for ensuring that the subcontractors comply with the health insurance requirements. In signing the affidavit, consultants, general contractors and major subcontractors may refer to and rely upon these Guidelines for interpretation.
2. Health insurance is required for all permanent employees, except for those employees who work less than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours, that the individual is paid. Temporary employees will be covered to the same extent as the City of Tempe covers temporary employees as determined at the start of each project.
3. The level of health insurance provided shall be determined by each employer, but should be no less than that provided by the Arizona Cost Containment Health System. Employees should be covered at 100% of the costs for health insurance. The employer must offer insurance to employees for their eligible dependents.
4. In the event that an employer has multiple offices, the health insurance requirements herein apply to the employer's offices that are directly involved with the City's project.
5. Health insurance coverage must be maintained during the entire time of the contract with the City.
6. All complaints concerning violations of the health insurance requirements shall be filed, in writing, with the city Procurement Office, within five (5) days from discovery of the violation. An administrative hearing will be held before the Central Services Administrator, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal

from the decision of the Central Services Administrator may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Financial Services Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

7. In the event of a finding of violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any City Procurement Office contract with the City for a period of three (3) years.
 8. All consultants and contractors subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at the job site. Signs for posting will be provided by the City.
71. **Ensure to Insure:** The policy of the City of Tempe as established by Resolution No. 2000.73 for certain Public Works contracts shall also be applied to this contract. Concessionaire(s) shall provide Health Insurance to its employees and their dependents except for employees who work less than one hundred twenty (120) days in any calendar year. The City Procurement Office shall administer this requirement consistent with the guidelines and procedures for implementation of Resolution 2000.73. Contractor shall provide a verified affidavit annually of its compliance.

**CITY OF TEMPE
TEMPE, ARIZONA
DEPARTMENT OF PUBLIC WORKS
AFFIDAVIT OF GENERAL CONTRACTOR
REGARDING
HEALTH INSURANCE**

, Arizona

Date

Project Name

Project Number

On behalf of _____ (name of company) I hereby certify that _____

(name of company) currently has, and all of its subcontractors representing 10% or more of the subject contract will have, during the course of this contract, health insurance for all employees and dependents of such employees, as defined in the accompanying Guidelines. The health insurance provided by _____ (name of insurance company) is as follows:

Type of Insurance (PPO, HMO, POS, INDEMNITY):

Policy No.: _____

Policy Effective Date (MM/DD/YY): _____

Policy Expiration Date (MM/DD/YY): _____

Signed and dated at , this day of , 2002.

Contractor
By:

STATE OF ARIZONA)

) ss

COUNTY OF MARICOPA)

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2001.

Notary Public

My commission expires: _____

ATTACHMENT 3

DRAFT MAYOR AND COUNCIL MEMORADIUM – SUBJECT: LOCAL BUSINESS PREFERENCE

****DRAFT****

May 21, 2001

Local Business Preference (City-wide)

INTRODUCTION

Council Member Leal requested a discussion item regarding a local business preference ordinance for contractors and subcontractors similar to a program in Albuquerque, New Mexico.

BACKGROUND

Preference laws relating to public purchasing are designed to give business concerns within local areas price advantage over non-local businesses in competing for public contracts. Usually this occurs by reducing, for evaluation purposes, the bid of the local business by a specified percentage.

The Mayor and Council previously reviewed the local preference issue in 1983, 1988, 1990, and 1999. The Mayor and Council have not adopted such preference laws. In 1990, a business privilege "tax offset" for Tucson business was adopted.

CURRENT PRACTICES

The Procurement Department continually reviews the City procedures to encourage local purchases. Staff actively works with business groups, individual firms, and presents workshops locally. In addition, the forth edition of the "Contracting with the City of Tucson" brochure was published in October 2000. The intent of this brochure is to provide information to assist prospective bidders in doing business with the City.

In 1990, the Mayor and Council adopted a "Sales Tax Off-Set" ordinance. This ordinance, in effect, provides an advantage for Tucson businesses in competing with vendors from other cities in Arizona. Under this ordinance, purchases are evaluated by adding the local tax to the base bid of non-Tucson firms. The amount of Tucson sales tax is not added to the base bid of Tucson firms. (Since Tucson does not have a "use" tax, there is no "offset" to apply to non-Arizona vendors.) Since its inception in 1990 and through April 1, 2001, \$_____ has been awarded to Tucson vendors as a result of the tax-offset program. This is business, which would have otherwise gone to vendors in other Arizona cities. In addition, the City of Tucson has received \$_____ in direct tax revenue that would not have been received without the tax-offset policy. (See Attachment A for additional information on this program.)

**MAYOR AND COUNCIL MEMORANDUM -2-
"Local Business Preference"**

May 21, 2001

Since FY 91-92, the City has awarded an average ____% of annual purchases to vendors within the local metropolitan area. In addition, some of the major purchases from non-Tucson businesses are not available, at any price, locally. These include such high dollar purchases as fire trucks and transit buses.

ALBUQUERQUE PREFERENCE ORDINANCE

The City of Albuquerque adopted a "Resident and Local Preference" ordinance. (A copy of the Ordinance is provided as Attachment B.) Albuquerque defines local as "... a place of business in the Albuquerque Metropolitan Area, and that

- (a) Ten or more of its employees are residents of the area;
- (b) If a corporation, a majority of its outstanding shares are beneficially owned by individuals who are residents of the area, or
- (c) If a partnership, its partners owning a majority beneficial interest in the partnership are residents of the area; or
- (d) If an individual or a sole proprietor, he or she is a resident of the area."

Albuquerque provides for a 5% preference and the preference is applied in the following priority:

- (1) Local manufacturer
- (2) Local business
- (3) Resident manufacturer
- (4) Resident business

The Albuquerque ordinance does not apply to construction contracting, purchase of goods and services in excess of \$5,000,000, or when the expenditure of federal funds is involved. To apply for this preference, local firms are required to submit a certification form with the bid.

May 21, 2001

LEGAL CONSIDERATIONS

The adoption of a local preference has legal constraints. The awards of public improvements (construction) contracts are governed by state statute, which requires that the award be made to the lowest responsible bidder. Under a previous state law, a bid preference had been allowed for Arizona contractors who have paid Arizona taxes for two consecutive years in the amount of at least \$200. However, this preference was held unconstitutional by the Arizona Supreme Court in 1990 in the case of *Big D Construction Corp v. Court of Appeals for the State of Arizona, Division One*. The Court found that the preference had no rational relationship to its original purpose of decreasing unemployment or increasing tax revenue nor was it any longer true that the preference was given to contractors who made a contribution to the funds from which they were to receive a benefit. Any local preference would have to be designed to accomplish a legitimate governmental purpose as discussed in the *Big D* case. Justice Feldman, writing the unanimous decision, concluded that the preference at issue "... encourages subterfuge, is expensive to the public entities that must comply with it, and simply wastes taxpayers' money."

The Albuquerque ordinance does not appear to meet the requirements established by the Arizona Supreme Court in the case of *Big D*. The definition of local preference does not assure a return to the community in proportion to the cost incurred by the preference. If Mayor and Council are to adopt a local preference ordinance, it must be carefully reviewed to comply with the requirements set forth by the Arizona Supreme Court.

ANALYSIS

The potential advantages and disadvantages of a local preference ordinance, in summary format, are as follows:

Advantages:

- increase the tax base
- assist the local economy
- may reduce local unemployment
- may create incentives for new business development

Disadvantages

- increases the purchase price
- may discourage potential non-local business from bidding, and thereby reduce competition
- encourages retaliatory legislation by other states or local governments (32 states have reciprocal local preference laws)
- may be unconstitutional (additional legal review may be necessary)
- difficult to administer and define the preferred class

**MAYOR AND COUNCIL MEMORANDUM -4-
"Local Business Preference"**

May 21, 2001

RECOMMENDATION

It is recommended that the Mayor and Council provide direction concerning this issue.

Respectfully submitted,

James Keene
City Manager

Attachment A - Tax Offset Report
Attachment B - Albuquerque's Preference Ordinance

JK: Wayne A. Casper, C.P.M.
Procurement Director

40. Employment, Training, and Contracting Opportunities for Low-Income Persons, Section 3 of the Housing and Urban Development Act of 1968.

- (a) The work to be performed under this contract is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (section 3). The purpose of section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by section 3, shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly persons who are recipients of HUD assistance for housing.
- (b) The parties to this contract agree to comply with HUDs regulations in 24 CFR part 135, which implement section 3. As evidenced by their execution of this contract, the parties to this contract certify that they are under no contractual or other impediment that would prevent them from complying with the part 135 regulations.
- (c) The contractor agrees to send to each labor organization or representative of workers with which the contractor has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or workers representative of the contractors commitments under this section 3 clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the person(s) taking applications for each of the positions; and the anticipated date the work shall begin.
- (d) The contractor agrees to include this section 3 clause in every subcontract subject to compliance with regulations in 24 CFR part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR part 135. The contractor will not subcontract with any subcontractor where the contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR part 135.
- (e) The contractor will certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected but before the contract is executed, and (2) with persons other than those to whom the regulations of 24 CFR part 135 require employment opportunities to be directed, were not filled to circumvent the contractors obligations under 24 CFR part 135.
- (f) Noncompliance with HUDs regulations in 24 CFR part 135 may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD assisted contracts.
- (g) Pursuant to 24 CFR 905.170(b), compliance with Section 3 requirements shall be to the maximum extent consistent with, but not in derogation of compliance with section 7(b) of the Indian Self-Determination and Education Assistance, 25 U.S.C. section 450e(b) when this law is applicable.

41. Interest of Members of Congress

No member of or delegate to the Congress of the United States of America shall be admitted to any share or part of this contract or to any benefit that may arise therefrom.

42. Interest of Members, Officers, or Employees and Former Members, Officers, or Employees

No member, officer, or employee of the PHA, no member of the governing body of the locality in which the project is situated, no member of the governing body of the locality in which the PHA was activated, and no other public official of such locality or localities who exercises any functions or responsibilities with respect to the project, shall, during his or her tenure, or for one year thereafter, have any interest, direct or indirect, in this contract or the proceeds thereof.

43. Limitations on Payments made to Influence Certain Federal Financial Transactions

- (a) The Contractor agrees to comply with Section 1352 of title 31, United States Code which prohibits the use of Federal appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, and officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant; the making of any Federal loan; the entering into of any cooperative agreement; or the modification of any Federal contract, grant, loan, or cooperative agreement.
- (b) The Contractor further agrees to comply with the requirement of the Act to furnish a disclosure (OMB Standard Form LLL, Disclosure of Lobbying Activities) if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative agreement.

44. Royalties and Patents

The Contractor shall pay all royalties and license fees. It shall defend all suits or claims for infringement of any patent rights and shall save the PHA harmless from loss on account thereof; except that the PHA shall be responsible for all such loss when a particular design, process or the product of a particular manufacturer or manufacturers is specified and the Contractor has no reason to believe that the specified design, process, or product is an infringement. If, however, the Contractor has reason to believe that any design, process or product specified is an infringement of a patent, the Contractor shall promptly notify the Contracting Officer. Failure to give such notice shall make the Contractor responsible for resultant loss.

45. Examination and Retention of Contractor's Records

- (a) The PHA, HUD, or Comptroller General of the United States, or any of their duly authorized representatives shall, until 3 years after final payment under this contract, have access to